IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[Chapter VIII, Rule 32(2) (b)]
Description of case

Second Appeal No. 33 of 2004 **Decided on: August 21, 2006**

WITH

Second Appeal No. 40 of 2004

A.F.R. (Approved for Reporting)
Not approved for Reporting

Date. 21.08.2006

(Initial of Judge)

Note: Bench reader will attach this at the top of the first page of the judgment when it is put up before the Judges for signature.

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Second Appeal No. 33 of 2004

Ram Kumar
R/o Maharajdeen
R/o Village Baniawala, Mauza Arkadia Grant,
Central Doon, Dehradun.

…….. Defendant/Appellant

Versus

1. Shri Virender Singh
   S/o Shri Gyan Singh Rawat,
   R/o Village Baniawala, Mauza Arkadia Grant,
   Central Doon, Dehradun.

…… Plaintiff/Respondent

2. Shri Sumer Chand S/o Sri Maharajdeen
3. Sri Ganga Prasad @ Jai Prasad
   S/o Sri Sukh Dev.

   Respondent Nos. 2 & 3 are R/o Village
   Baniawala, Mauza Arkadia Grant,
   Central Doon, Dehradun.

…….Defendants/Respondents

ALONG WITH

Second Appeal No. 40 of 2004

Sri Ganga Prasad @ Jai Prasad
S/o Sri Sukh Dev
R/o Village Baniawala, Mauza Arkadia Grant,
Central Doon, Dehradun.

…….. Defendant/Appellant

Versus

1. Shri Virender Singh
   S/o Shri Gyan Singh Rawat,
   R/o Village Baniawala, Mauza Arkadia Grant,
   Central Doon, Dehradun.

…… Plaintiff/Respondent

2. Sri Ram Kumar S/o Sri Maharajdeen
3. Shri Sumer Chand S/o Sri Maharajdeen

Respondent Nos. 2 & 3 are R/o Village
Baniawala, Mauza Arkadia Grant,
Central Doon, Dehradun.

……Defendants/Respondents

Mr. V.K. Kohli, Senior counsel assisted by Mr. T. Pandey, learned counsel for the appellants.
Mr. V.K. Bist, Senior Counsel assisted by Mr. B.S. Thind, learned counsel for respondent No. 1.

Hon'ble Prafulla C. Pant, J.

These appeals, preferred under Section 100 of the Code of Civil Procedure, 1908, are directed against the judgment and decree dated 21.01.2004, passed in Civil Appeal No. 167 of 2001 by the then learned Additional District Judge / Fast Track Court II, Dehradun, whereby the said appeal is allowed and Original Suit No. 747 of 1995 is decreed for specific performance of contract under agreement of sale.

2) I heard learned counsel for the parties and perused the record.

3) Brief facts of the case are that plaintiff instituted the suit No. 747 of 1995 with t he pleadings that defendant Ram Kumar executed an agreement dated 05.06.1995 to sell his land to the plaintiff Virender Singh for Rs. 42,000/-, and got the same registered. Out of the sale consideration of Rs. 42,000/-, it is alleged in the plaint that Rs. 10,500/- was received by defendant Ram Kumar at the time of instituting the agreement, and Rs. 20,500/- was paid prior to the execution of the agreement. The rest of the amount i.e. Rs.

11,000/- was to be paid at the time of execution of sale deed. It was pleaded that the sale deed was to be executed by 15.08.1995. When the defendant Ram Kumar failed to execute sale deed in favour of the plaintiff Virender Singh, the latter sent notice dated 10.07.1995 asking the defendant Ram Kumar to be present in the office of the Sub Registrar on 10.07.1995, at 10:30 A.M. to execute the sale deed, as agreed between them. On the said date defendant did not oblige the plaintiff. Instead, he sold the property to defendant Ganga Prasad @ Jai Prasad. Defendant No. 2 Sumer Chand was impleaded in the suit as per direction of the trial court.

2) Defendants contested the suit and filed their written statements. Defendant Ram Kumar took the plea that infact agreement was executed with the condition that the plaintiff Virender Singh shall pay loan of the defendant to the Land Development Bank, which he failed to do. Defendant Ram Kumar denied having received sum of Rs. 20,500/- from the plaintiff. He further pleaded that the suit is barred by provisions contained in Section 17, 20, 38 and 41 of the Specific Relief Act, 1963. Defendant No. 2 Sumer Chand filed separate written statement, in which he took the plea that the land measuring .02 acres in Khasra No. 1368 bears his share also, as such, defendant Ram Kumar had no power to transfer his share to the plaintiff. Defendant No. 3, Ganga Prasad @ Jai Prasad filed his separate written statement defending the sale deed executed in his favour by Somi Devi, power of attorney holder of defendant Ram Kumar.

5) The trial court framed as many as ten issues. After recording the evidence and hearing the parties, the trial court found that the defendant Ram Kumar did execute agreement of sale on 05.06.1995 in favour of the plaintiff Virender Singh to sell his land for consideration to the tune of Rs. 42,000/-. It further found that Rs. 10,500/- were received by the defendant Ram Kumar at the time of executing the agreement and Rs. 20,500/- before executing it. As to the readiness and willingness on the part of the plaintiff to perform his part of contract it was found that he was ready and willing to perform his part of contract. On the point of limitation, the issue was decided in negative i.e. in favour of the plaintiff as the defendants did not press it. Similarly, issue on the point whether the suit is barred by various provisions of the Specific Relief Act, that too was not pressed by the defendant Ram Kumar and said issue was also decided in favour of the plaintiff. The trial court also found that suit is not bad for non-joinder of the Land Development Bank as no relief has been claimed against it. The trial court further found that the agreement of sale in question is not void or ineffective on the ground that the property in question was already mortgaged by the defendant Ram Kumar to the Bank, from which he had taken the loan. As to the objection of defendant Sumar Chand, it was found that said defendant had no share in plot No. 1368, in respect of which the agreement of sale was executed. Issue on the point of valuation and court fee was decided against the defendants. Lastly, it was found that the defendant Ganga Prasad @ Jai Prasad is not a bonafide purchaser of the property from the defendant Ram Kumar

and transaction was sham, as such, the sale deed in favour of the defendant Ganga Prasad @ Jai Prasad have no impact in the suit for specific performance of contract against the defendant Ram Kumar. However, the trial court did not decree the suit for specific performance of contract, but decreed only for refund of Rs. 31,000/- (consideration passed from plaintiff to the defendant Ram Kumar) with interest at the rate of 6% per annum with quarterly rests. The reason for not decreeing the suit for specific performance of contract, but for refund of the aforesaid amount, given by the trial court is that the property to be sold by the defendant Ram Kumar was already mortgaged with the Bank and the plaintiff was not ready and willing to purchase the property subject to the encumbrance.

6) Against said judgment and decree dated 31.08.2001 passed by the trial court, civil appeal No. 167 of 2001 was preferred by the plaintiff. The lower appellate court, after hearing the parties, allowed the appeal and decreed the suit for specific performance of contract. Aggrieved by the same, defendant Ram Kumar and defendant Ganga Prasad @ Jai Prasad have filed these separate appeals.

7) The Appeals were admitted on following substantial questions of law:

i) Whether, discretionary relief granted by the trial court after examination of facts and law can be overruled by the first appellate court?

ii) Whether, a court can decree a suit for specific performance without following the provisions of

Section 20 of Specific Relief Act, 1963, and without giving any finding thereon?

iii) Whether, the specific performance of contract can be directed, even if the refund of money is an adequate remedy?

iv) Whether, the suit for specific performance can be decreed for sale of property with encumbrance without having recorded finding as to willingness of the plaintiff of purchase the property subject to charge?

Answer to substantial question of law No. 1:

8) From the perusal of the record it is clear that even after recording all the findings in favour of the plaintiff, the trial court in its discretion instead of granting relief of specific performance of contract, decreed suit for refund of money paid by the plaintiff to the defendant, as the property was already mortgaged with a Bank. On the other hand, the lower appellate court reversed the decree passed by the trial court decreeing the suit for specific performance of contract. It is settled principle of law that the first appellate court can re-appreciate the evidence on record and has a power to reverse any of the finding in full or in part, and can also reverse the decree. Unlike second appellate court, there is no bar as against the first appellate court in setting aside the decree passed by trial court based on its judicial discretion. The learned counsel for the appellant could not show me any authority which bars the first appellate court from reversing the decree passed on judicial discretion, for the reasons recorded there for. As such, the substantial question of law is answered accordingly, that the first appellate court can

reverse the decree passed on the basis of judicial discretion of the trial court provided it records valid reasons there for.

Answer to substantial question of law Nos. 2 and 3:

9) Section 20 of the Specific Relief Act, 1963, reads as under:

> "*20.* ***Discretion as to decreeing specific performance****-*
>
> *(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so but the discretion of the court is not arbitrary but sound and reasonable guided by judicial principles and capable by a court of appeal.*
>
> *(2) The following are cases in which the court may properly exercise discretion not to decree specific performance-*
>
> *(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage, over the defendant; or*
>
> *(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;*
>
> *(c) where the defendant entered into the contract under circumstances which though not*

rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1. *– Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).*

Explanation 2. *- The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.*

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

The above provision contained in Specific Relief Act, 1963, makes it clear that the jurisdiction of the court to grant relief of specific performance of contract is a discretionary one. It further provides that the court should avoid granting such decree where the plaintiff is taking unfair advantage of the agreement, or where the defendant would be put to a greater

hardship as against the plaintiff or where the contract though not voidable but inequitable, between the parties.

10) Undoubtedly, the defendant Ram Kumar had mortgaged the property to the Bank for taking the loan. Thereafter, as is clear from the record, concealing the fact relating to the mortgage of the property, he entered into agreement of sale with the plaintiff, and ultimately did not execute the sale in favour of the plaintiff in terms of the impugned agreement of sale. Instead, the defendant sold the property to his kith and kin, defendant No. 3 Ganga Prasad @ Jai Prasad in an attempt to avoid specific performance of agreement of sale in question. Concurrent findings given by the courts below on these facts need not to be interfered by this Court.

11) From the perusal of the judgment and decree passed by the trial court and the first appellate court, it is clear that the courts below have considered all the points, raised before them. In the opinion of this Court, only those questions relating to provisions contained in Section 20 of the Specific Relief Act, 1963, are required to be discussed by the courts below which were raised before them for granting or not granting the relief. After going through the judgment and decree of the lower appellate court, this Court do not find, that the decree for specific performance of contract, passed by the first appellate court, is in violation of provisions of Section 20 of the Specific Relief Act, 1963.

12) Though, the trial court in exercise of judicial discretion thought it proper to grant relief of refund of money paid by

the plaintiff to the defendant in pursuance of agreement of sale, but the first appellate court who was competent to reverse said decree for the reasons recorded has committed no error of law in reversing the decree as it did not find reasons given by the trial court sufficient to refuse the decree of specific performance of contract. The question as to the adequacy of the remedy in terms of money in place of decree of specific performance of contract, depends on the facts and circumstances of each case and the first appellate court has exercised its judicial discretion in the facts and circumstances before it and in doing so it has not violated any law. Accordingly, both the substantial questions of law Nos. 2 and 3 are answered.

Answer to substantial question of law No. 4:

13) The entire controversy on which the granting or refusing the relief of specific performance of contract in this case hanging, is that the property in suit was subject to the charge of the Bank, to whom it was mortgaged. The trial court did not thought it proper to grant relief of specific performance of contract as the plaintiff in his oral evidence has stated that had he been aware of the fact that the property was mortgaged one, he would not have entered into agreement. On that ground the trial court opined that plaintiff is not ready to buy the property subject to encumbrance. And, that is why instead of decreeing the suit for specific performance it directed to refund the amount to the plaintiff accepted by the defendant with interest. However, the first appellate court relying on principle of law laid down in ***R. Velammal Vs. R. Daivasigamani, reported in A.I.R. 1993 MADRAS page 100,*** decreed the suit for specific

performance as it was found that there is no legal impediment in sale of property subject to encumbrance. This Court is also of the view that a suit can be decreed for specific performance of contract for sale of property even if it is subject to encumbrance provided that the plaintiff is willing to purchase the property subject to such encumbrance.

14) Mr. V.K. Kohli, senior counsel for the appellants argued that the first appellate court has committed error of law in granting the relief of specific performance of contract without there being any evidence that the plaintiff was ready and willing to purchase the property subject to encumbrance. On examination of the impugned judgment, this Court found that while decreeing the suit for specific performance of contract, the first appellate court has observed that the plaintiff (present respondent No. 1) is ready to purchase the land in suit with the charges of the Bank. This fact recorded by the first appellate court cannot be said to be without basis. Defendant No. 1 Ram Kumar himself in his written statement has stated that the plaintiff had the knowledge that the defendant No. 1 has taken loan from Land Development Bank and the plaintiff had agreed to pay for the loan taken by defendant Ram Kumar. That being so, it is clear on the record that plaintiff had the knowledge of the loan taken by the plaintiff from the Land Development Bank. As such, the judgment and decree passed by the first appellate court cannot be said to be erroneous in law nor can its findings be said to be perverse. Therefore, the substantial question of law No. 4 is answered with the observation that there is no impediment in passing the decree of specific performance of

contract for sale of property subject to encumbrance provided the purchaser is ready to purchase the same subject to such encumbrances.

15) For the reasons as recorded above, I do not find any good ground to interfere with the judgment and decree passed by the first appellate court. Accordingly, both the appeals are liable to be dismissed. The same are dismissed. Costs easy.

(Prafulla C. Pant, J.)

Dt. 21 August, 2006.
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